

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-090211
	:	TRIAL NO. B-0808757(A)
Plaintiff-Appellee,	:	
	:	<i>JUDGMENT ENTRY.</i>
vs.	:	
KOLON CARTER,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

In four assignments of error, defendant-appellant Kolon Carter claims that he was improperly convicted of aggravated robbery. In one additional assignment of error, he claims that his sentence was excessive. We disagree and affirm.

Carter was the passenger in a white vehicle being driven by codefendant Kortney Maxberry. At the same time, Fred Simmons was walking home. According to Simmons, the vehicle stopped and Carter got out. Carter had a gun and demanded money. When Simmons told him that he had none, he was struck in the head. Carter and Maxberry then drove away.

Moments after the attempted robbery, Simmons heard gunshots a short distance away. He then saw police vehicles responding down the street from him. He learned that a white vehicle was involved in the shooting, and he told police that he had been involved in an incident moments before involving the same vehicle.

Carter had been shot at the scene of the second incident and was unconscious. During their investigation, police learned that Carter had tried to rob another group

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

of individuals, but that they had shot him instead and taken his gun. Police also learned that Carter matched Simmons's description of the man who had attacked him. While the incidents had originally been investigated separately, police quickly realized that they were related.

Simmons identified both the white vehicle involved in his incident and Carter in a photo array. Maxberry admitted that he and Carter had been at the scene. He also admitted that Carter had a conversation with Simmons.

Carter was indicted for one count of aggravated robbery,² with specifications, and one count of robbery.³ After a jury trial, he was found guilty of both charges and the accompanying specifications. At sentencing, the robbery count was merged with the aggravated-robbery count as an allied offense. Carter was sentenced to five years in prison for aggravated robbery and to three additional years on one specification. The sentences were ordered to be served consecutively for a total of eight years. The trial court also imposed court costs.

On appeal, Carter raises five assignments of error. For ease of analysis, we address the arguments slightly out of order.

Carter's first assignment of error alleges that his conviction was based upon insufficient evidence; his second alleges that the conviction was contrary to the manifest weight of the evidence; and his third alleges that the trial court improperly denied his motion for an acquittal. When an appellant challenges the sufficiency of the evidence, we must determine whether the state presented adequate evidence on each element of the offense.⁴ The standard for determining the propriety of an acquittal pursuant to Crim.R. 29 is functionally equivalent.⁵ On the other hand,

² R.C. 2911.01(A)(1).

³ R.C. 2911.02(A)(2).

⁴ See *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52, 678 N.E.2d 541.

⁵ See *State v. Coffman*, 5th Dist. No. 07 CA A 08 0042, 2008-Ohio-2163, at ¶¶13-18, citing *State v. Bridgeman* (1978), 55 Ohio St.2d 261, 381 N.E.2d 184, syllabus, and *Thompkins*, supra.

when reviewing whether a judgment is against the manifest weight of the evidence, we must determine whether the trier of fact clearly lost its way and created a manifest miscarriage of justice.⁶

In this case, Carter's main argument is that his conviction was based upon only the testimony of the victim. The victim identified Carter and the vehicle in which he was traveling. His testimony was corroborated by the fact that Carter was found shot one block from the scene of the crime. The testimony was further corroborated by the statement of Maxberry that placed Carter in the vehicle and then at the scene talking to Simmons. Based upon the evidence in the record, the state presented sufficient evidence on each element of the offense to support a conviction, and the trial court did not clearly lose its way and create a manifest miscarriage of justice in finding Carter guilty of aggravated robbery.

In his fifth assignment of error, Carter claims that his trial counsel was ineffective for failing to object to certain testimony. To establish ineffective assistance, Carter must show that counsel's performance was outside the range of professionally competent assistance and that counsel's deficient performance prejudiced the defense and deprived him of a fair trial.⁷ Prejudice is shown when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."⁸

Carter first claims that counsel was ineffective for failing to object to the statements of his codefendant Maxberry pursuant to *Bruton v. United States*.⁹ He argues that the statements were "especially damaging, as [they] placed Mr. Carter at

⁶ See *id.* at 387.

⁷ *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052.

⁸ *Id.* at 694.

⁹ (1968), 391 U.S. 123, 88 S.Ct. 1620.

the scene of the alleged robbery.” *Bruton* holds that a defendant is deprived of his Sixth Amendment right of confrontation when “a facially incriminating extrajudicial statement of a nontestifying co-defendant is introduced at their joint trial, despite a trial court’s instruction to the jury to consider the statement only against the co-defendant.”¹⁰

But even where the *Bruton* rule had been violated, such “[a] violation * * * is not prejudicial where there is sufficient independent evidence of an accused’s guilt to render improperly admitted statements harmless beyond a reasonable doubt.”¹¹ In this case, Maxberry’s statement merely placed Carter at the scene. It was not facially incriminating, and—since Carter was shot and unconscious a block away—it was not the only evidence placing Carter at the scene. Simmons also placed Carter at the scene. Under these circumstances, the failure to raise a *Bruton* challenge to the admission of Maxberry’s statement did not deprive Carter of a fair trial.

Carter further claims that counsel should have objected to the testimony of the police officer that Carter had been shot while committing another robbery. But counsel for Carter had opened the door to this issue by asking on cross-examination if a gun had been recovered. On redirect, the prosecutor asked what had happened to the gun. The officer testified that he had learned during the concurrent investigations that the second group of people whom Carter tried to rob had taken Carter’s gun. We cannot say that it was outside the realm of sound trial strategy not to object to an explanation of an issue that defense counsel himself had raised. Nor can we say that, but for this evidence, the outcome of the trial would have been different.

¹⁰ *State v. Wilkerson*, 10th Dist. No. 01AP-1127, 2002-Ohio-5416, at ¶43.

¹¹ *Id.*, quoting *State v. Moritz* (1980), 63 Ohio St.2d 150, 155, 407 N.E.2d 1268, paragraph two of the syllabus; see, also, *Schneble v. Florida* (1972), 405 U.S. 427, 92 S.Ct. 1056.

For these reasons, we conclude that Carter did not receive ineffective assistance of counsel, and we overrule his second assignment of error.

Finally, Carter claims that his sentence was excessive. Carter argues that the term of imprisonment was “an abuse of discretion, as it was erroneous and excessive,” but he makes no argument as to why this was so. Carter was sentenced to five years in prison for aggravated robbery, a felony of the first degree, and to three years for the accompanying gun specification. This was only two years more than the minimum sentence, which Carter’s trial counsel had asked for at sentencing. In light of the fact that Carter faced a possible 13-year total sentence, and the fact that he received only two years more than he had asked for, we cannot say that the trial court’s sentence was excessive. The final assignment of error is overruled.

Having considered and overruled all five of Carter’s assignments of error, we affirm the trial court’s judgment.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HILDEBRANDT, P.J., DINKELACKER and MALLORY, JJ.

To the Clerk:

Enter upon the Journal of the Court on May 26, 2010

per order of the Court _____.
Presiding Judge